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No. 89-238

In The

Supreme Court of the United States

October Term, 1989

EDGAR H. HADLEY,

Petitioner,

v.

HELEN C. HADLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

I. Whether the Uniformed Services Former Spouse Protection Act (10 U.S.C. §1408) [FSPA] is an impermissible delegation of exclusive Congressional authority and responsibility, in violation of the United States Constitution, Article 1, Section 8, and as such is therefor unconstitutional?

II. Whether the FSPA, if constitutionally valid on its face, permits the Washington state courts to recharacterize the nature of Military Retired/Retainer pay as a property interest, contrary to section (c) (2) of that Act and decision of this Court?

III. Whether the FSPA, if constitutionally valid on its face, is unconstitutionality interpreted and applied by the Washington state courts, in violation of the due process clause, the contractual impairments clause and the Thirteenth Amendment of the United States Constitution?

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Respondent Helen Hadley, by and through her counsel of record, respectfully presents this Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of Washington.

I.

STATEMENT OF FACTS

The parties entered into a stipulated interlocutory judgment dissolving their marriage[1] on July 20, 1979. The Judgment was entered into in Sacramento, California. Mrs. Hadley was a California resident and Mr. Hadley was a Washington resident. A final judgment was entered on February 27, 1980. The stipulated interlocutory judgment contained a provision which divided the parties community property.

> B. (1) Respondent shall pay to Petitioner a sum equal to three-sevenths (3/7) of all amounts he receives monthly as and for his military retirement pay. Such fraction shall remain constant so that Petitioner will receive the benefit of any increases in retirement benefits payable to Respondent. Respondent shall notify Petitioner the amount of any future increases in military retirement benefits within thirty days (30) days from his notification of such increases. Such payments shall commence the

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[1] The parties married in 1950 and became residents of Washington in 1974. Mrs. Hadley moved to California after their separation in 1976. Divorce proceedings were instituted in California in 1977 with Mr. Hadley submitting to the jurisdiction of the court.

> month next following entry of this judgment and shall be mailed or otherwise made by the fifteenth day of each month. Petitioner shall pay taxes on the monies received by her pursuant to this paragraph.

Mr. Hadley did not begin making payments to Mrs. Hadley until after entry of the final judgment on February 27, 1980. Mr. Hadley ceased making payments after the decision in *McCarty v. McCarty*, 453 U.S. 210, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981). Payments did not resume until Mrs. Hadley obtained resumption of payments under the Federal Uniform Services Former Spouses' Protection Act (10 U.S.C. §1408). Over time Mr. Hadley manipulated his withholding exemptions causing reduction of Mrs. Hadley's share of the military pension.

In 1984 Mr. Hadley's military pension was reduced after Mr. Hadley was awarded a disability pension, resulting in a reduced payment to Mrs. Hadley beyond that caused by Mr. Hadley's manipulation of the withholding tax amounts.

Mrs. Hadley filed the 1980 judgment in the Superior Court of Spokane County, State of Washington on June 4, 1982, and sought, among other things, enforcement of the terms of the

judgment[2] and the court to construe a provision of the interlocutory decree.

The trial court (Spokane County Superior Court, State of Washington) awarded Mrs. Hadley a judgment against Mr. Hadley individually, in the amount of $11,452.00 for "unpaid installments of military retirement pay accruing from April, 1981 through March, 1983."

Mrs. Hadley appealed to the Washington Court of Appeals, Division III, contending that: 1) the trial erred in concluding she was barred by RCW 26.16.200 from recovering her judgment against Mr. Hadley's one-half of the community property of his second marriage; 2) the court erred in not computing the amount she was owed in unpaid retirement pay installments using the gross amount of Mr. Hadley's retirement pay; 3) The court erred in refusing to allow her a recovery for military retirement pay between the interlocutory and the final decree; and 4) that the court erred in not clarifying the decree to allow her to receive 3/7ths of the total retirement and disability pay. The state appeals court found the trial court erred

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[2] Mrs. Hadley sought recovery of her portion of retirement payments during the period between April 1981 through May 1983 when Mr. Hadley stopped making the retirement payments after the *McCarty* decision. She further sought recovery of her portion of the retirement payments between the time of the filing of the California interlocutory and final judgments, as well as a clarification by the court whether or not she was entitled to 3/7ths of the total retirement and disability pay Mr. Hadley was receiving.

in all but the issue of Mrs. Hadley's entitlement to 3/7ths of the total retirement and disability pay.

Mr. Hadley moved for a Petition for Review by the Washington State Supreme Court, which was denied on the merits.

II.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THE WASHINGTON COURT CORRECTLY ENFORCED THE CALIFORNIA JUDGMENT AGAINST PETITIONER.

1. The *McCarty* decision does not invalidate the Hadley's divorce decree.

The final judgment dissolving the Hadley's marriage was entered with the court on February 27, 1980. This court's *McCarty v McCarty*, 453 U.S. 210, 101 S.Ct 2728, 69 L.Ed.2d 589 (1981) decision was issued in 1981. Petitioner's argument suggests that *McCarty* should be applied retroactively thereby invalidating the parties' pre *McCarty* decree, leaving 10 USC §1408 to restore the divorce decree. Arguments similar to this have been raised repeatedly in state and federal courts and have been repeatedly rejected. *Wilson v. Wilson*, 667 F.2d 497, 499 (5th Cir.), cert. denied, 458 U.S. 1107, 102 S.Ct. 3485, 73 L.Ed2d 1368 (1982; *Segrest v. Segrest*, 649 S.W. 2d 610, 613 (Tex. 1983), cert. denied, 464 U.S. 894, 104 S.Ct.

242, 78 L.Ed.2d 232 (1983); *In the Matter of the Marriage of Brown*, 98 Wn.2d 46. 653 P.2d 602 (1982) (retroactive application of *McCarty*). 10 USC §1408, rather than restoring the Hadley's decree, merely implements its terms.

2. Petitioner lacks the standing to challenge the constitutionality of 10 USC §1408.

Petitioner lacks the requisite standing to challenge the constitutionality of 10 USC §1408. The case of *Goad v. U.S.*, 661 F.Supp. 1073 (S.D.Tex. 1987), affirmed 837 F.2d 1096, cert. denied, 108 S.Ct. 1079, 99 L.Ed 2d 238, is four square on the issue of the constitutionality issue presented by this Petitioner.

The *Goad* case also involved a pre *McCarty* divorce decree. In the decree Mrs. Goad was granted 12/27th of Mr. Goad's military retirement. As in the instant case Mr. Goad refused to pay Mrs. Goad her share of the military retirement after *McCarty*. After passage of 10 USC §1408 Mrs. Goad applied for the withholding of the court ordered amount. Mr. Goad then brought an action in United States District Court, alleging, among other things, that 10 USC §1408 was an impermissible delegation of legislative power to the states, deprived him of due process and was a denial of equal protection.

The court in considering the government's motion to dismiss, found that Mr. Goad lacked the requisite standing to challenge the constitutionality

of 10 USC §1408. In so doing the court stated at page 1080:

> Because *McCarty* is not retroactive, the divorce decree dividing Mr. Goad's military retirement pay has always remained valid. Thus the FSPA (10 USC §1408), insofar as it sanctions such divisions, had no effect on Mr. Goad. The FSPA only affects Mr. Goad insofar as it permits the direct withhold of Mr. Goad's funds. Mr. Goad has standing only to assert claims relating to that withholding. He cannot challenge the Act's constitutionality insofar as it permits states to consider military retirement benefits as divisible community property, because the division of retirement benefits by his decree always remained valid. Implementation of the FSPA does not affect or injure him. *Heckler v. Matthews*, 46 U.S. 728, 738, 104 S.CT. 1387, 1394-95, 79 L.Ed.2d 646 (1984). (Emphasis added)

For the same reasons elucidated by the *Goad* court, this Petitioner lacks the requisite standing to challenge the constitutionality of 10 USC §1408.

Beyond the issue of standing, the *Goad* court addressed the merit of Mr. Goad's claim that 10 USC §1408 was an impermissible delegation of

authority to state courts to make laws or rules regarding military pay. The *Goad* court at page 1080 stated:

> The Act (10 USC §1408) merely allows the state courts to consider military retirement pay when making property divisions under their own laws. Congress retains the power to exclude any and all divisions of military retirement pay.

The issues raised by Petitioner have been considered in one form or another by this Court and decided adversely to Petitioner's position. Accordingly, there is no basis for granting the petition.

3. The Washington Courts did not redefine or recharacterize the nature of retired military compensation paid to Mr. Hadley.

The Courts of the State of Washington did not recharacterize Mr. Hadley's retired military compensation. The Washington courts merely enforced the 1980 California judgment between Mr. and Mrs. Hadley, affording it full faith and credit in the State of Washington. Petitioner made no showing in any proceedings in the State of Washington that the characterization of the property involved in the California judgment was invalid or impermissible or that there was a lack of jurisdiction over the parties or subject matter by the California court, therefore rendering the California

judgment valid and resultingly a valid Washington judgment. *State v. Vestal*, 43 Wn. App. 663, 719 P.2d 163 (1986). The Washington court's decision was correct, and as a consequence providing no basis for granting the petition.

III.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari to the Washington State Supreme Court.

DATED this 31st day of August, 1989.

RESPECTFULLY SUBMITTED,

STANLEY A. KEMPNER, JR.
Attorney for Respondent